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No. 90-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE UPJOHN COMPANY,
Petitioner,
v.
NORTH HAVEN PLANNING AND ZONING COMMISSION
and SCOTT SCHATZLEIN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

H. BARTOW FARR, III *
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

S. ROBERT JELLEY
WILLIAM J. DOYLE
BRIAN J. CASEY
WIGGIN & DANA
One Century Tower
New Haven, CT 06508-1832
(203) 498-4400

* Counsel of Record

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Respondents' brief in opposition makes two points unmistakably clear: that North Haven has simply banned Upjohn's waste pile from the Town and that the ban has no environmental justification. Because the Town regulation on which the ban rests is not based on environmental concerns, the ban falls outside the scope of RCRA's savings clause; and because the Town's measure is effectively absolute in prohibiting the waste disposal site, it threatens RCRA's commitment to the availability of safe disposal facilities. This case therefore squarely presents the issue whether such a ban—here, of a closed hazardous waste disposal facility that has specifically been found by the EPA to protect human health and the environment—is preempted by RCRA's policy of ensuring that communities take responsibility for their own waste problems.

1. Respondents now concede that the local regulation they rely on as barring Upjohn's waste pile is *not* an environmental regulation at all. Thus, the *only* regulation respondents rely on (*see* Br. in Opp. 6 n.3, 14-15 & n.8, 18 n.10) is the prohibition in Section 6 of the North Haven Zoning Regulations on any use of land that is not specifically allowed. *See* Pet. App. 65a (quoting regulation). That regulation, under the construction assumed by the courts below (and urged by respondents and adopted by the state court), flatly prohibits Upjohn's waste pile because the pile is not explicitly permitted. And, as respondents acknowledge, that regulation is not environmentally based: "the focus of the North Haven zoning regulations is on *land use* rather than environmental matters." Br. in Opp. 25. *See also* Br. in Opp. 14-15 (stressing land use basis); 18 (same).[1]

There can be no doubt that the Town has thus flatly banned Upjohn's waste pile, without any environmental basis. Although respondents attempt to suggest that the ban is site-specific, and not a Town-wide "ban" (Br. in Opp. 13-15), that suggestion is nothing but verbal quibbling. If the pile is prohibited in industrial areas by Section 6 of the Town's zoning regulations (as respondents

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[1] Respondents do not rely at all on Section 3.27.2.24 of the North Haven Zoning Regulations. The reason is evident: although that section authorizes the Town to choose to allow certain outdoor waste storage upon consideration of environmental and other factors (*see* Pet. App. 65a), the Town has not relied on such factors in banning Upjohn's waste pile, and respondents do not wish to be forced to justify the ban on environmental grounds. (Indeed, respondents concede that Upjohn's closure plan "complied with environmental standards for the closure of landfills containing hazardous wastes." Br. in Opp. 2.) Respondents insist that Upjohn's waste pile is flatly barred by Section 6's ban on any unlisted uses of industrial property, regardless of environmental safety. And the testimony of the zoning officer that respondents quote as explaining some of the basis for the ban confirms the absence of environment-based findings underlying the directive that Upjohn remove the waste pile from the Town. *See* Br. in Opp. 15 n.9.

insist that it is), it is prohibited anywhere in the Town. Certainly respondents do not suggest that there is some other site in the Town where the waste pile would be allowed under the Town's regulations. Hence, Section 6's "prohibition of the on-site permanent disposal of waste" (Br. in Opp. 14) is precisely the sort of local ban that, we urge, is preempted by RCRA.[2]

2. Given the lack of environmental basis for the Town's ban of Upjohn's waste pile, this case squarely presents the question whether a local government can, through a zoning regulation, ban waste disposal facilities from its jurisdiction without running afoul of RCRA. Respondents themselves have made clear that the "savings clause" of RCRA, 42 U.S.C. § 6929—which was at the heart of the court of appeals' and the district court's non-preemption rulings (Pet. App. 2a, 19a-20a)—cannot save the Town's ban. The savings clause preserves only regulations that are "more stringent" with respect to the environmental concerns that RCRA addresses; the local regulation respondents rely on, far from being more stringent in that sense, simply has nothing to do with environmental concerns at all. And we have explained in the petition why the congressional policy embodied in RCRA would be frustrated by localities' efforts to export their waste disposal problems to other communities. Pet. 14-22.

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[2] Respondents' argument (Br. in Opp. 13-16) that, in the courts below, Upjohn did not challenge the regulatory ban as inconsistent with RCRA—but merely challenged the particular directive as conflicting with the EPA/DEP approval decision—is patently incorrect. Indeed, the court of appeals stated that Upjohn "contends principally that the district court erred in concluding that RCRA does not preempt the Town's zoning regulations" (Pet. App. 2a), and the court then affirmed "the rulings of the district court that *federal law* and regulatory actions have not preempted the Town's zoning *regulations*." *Id.* at 3a (emphasis added). The district court, of course, held that "the local regulations are not preempted by RCRA" (*id.* at 20a) as well as that the EPA/DEP approval was not preemptive (*id.* at 20a-21a).

Respondents do not directly challenge that policy, but suggest instead that any local "land use" regulation is exempt from the policy. *See* Br. in Opp. 18-19. Yet RCRA's policy would be no less undermined if a community could achieve exactly the same result by putting the label "land use" on a regulation prohibiting a waste disposal facility. This case does not involve a community's decision to use zoning regulations to restrict hazardous waste disposal in (say) residential neighborhoods, while making provision for such disposal elsewhere in the community—such as in an industrial area where the waste was generated. Rather, it involves adherence to a policy that there is no place whatsoever in a particular community for the disposal of hazardous wastes that have been generated in industrial areas within its jurisdiction. Condoning such action would give communities a ready means of evading their RCRA responsibilities. Yet the courts below upheld the Town's action without demanding any environmental justification, including any possible justification concerning the impact of the waste pile on surrounding land uses.

Respondents also seek to avoid the anti-NIMBY policy of RCRA by noting that Congress, in 1984, sought to promote alternatives to *land* disposal of hazardous wastes. Br. in Opp. 21-23. But that congressional decision only highlights why RCRA's policy is in fact violated here. Congress expressly made its 1984 provisions governing landfills prospective only, applicable to *new* additions to landfills after certain dates but not to already existing landfills, such as Upjohn's, that no longer accepted wastes after those dates. *See* 42 U.S.C. § 6924. That decision confirms, rather than undermines, the congressional policy that communities should take responsibility for the hazardous waste problems that have already been generated in their jurisdictions. Congress did not allow communities, at least absent a sound environmental basis, to require enormously expensive removal of existing, closed land disposal facilities that have been found by EPA to protect human health and the environment.

3. The decision below, in respondents' own view, carries with it the sweeping implication that "land use" regulations have been approved as a means of allowing communities to escape their responsibility for dealing with locally generated waste. Review is also warranted because of the conflict with the decisions of other federal courts. *See, e.g., ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986); *Ogden Environmental Services, Inc. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988). Contrary to respondents' contentions (Br. in Opp. 24-26), those decisions cannot fairly be distinguished from the decision below on relevant grounds under RCRA.

Most important, both decisions rest fundamentally on the view, rejected by the Second Circuit here, that RCRA does not permit environmentally unjustified local actions that evade responsibility for safe waste disposal. The particular disposal facility at issue here is no less lawful under RCRA—and no less federally approved—than the disposal facilities at issue in *ENSCO* and *Ogden*. Moreover, the requirement of those cases that there be an environmental justification for any local refusal to permit a disposal facility cannot be evaded by a locality by the simple expedient of switching the labels on its action from "environmental" to "land use." Indeed, it would turn on its head the RCRA policy of ensuring safe disposal—as reflected, for example, in the savings clause's specific preservation only of "more stringent" regulations —to say, as respondents do, that no environmental defense of a local ban is required at all. Finally, it is immaterial that the Town's *purpose* in this case may not have been "to challenge federal authority." Br. in Opp. 26. It is the *effect* of the Town's action in impairing RCRA policy that renders its regulatory ban preempted. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987) (relying on *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), for the principle that the "effect rather than purpose of a state statute governs pre-emption analysis").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III *
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

S. ROBERT JELLEY
WILLIAM J. DOYLE
BRIAN J. CASEY
WIGGIN & DANA
One Century Tower
New Haven, CT 06508-1832
(203) 498-4400

* Counsel of Record

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